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In the

Supreme Court of the United States

October Term, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

6/14/69 Filed Complaint
6/14/69 Filed Designation
6/14/69 Filed Affidavit rule 39
6/14/69 Issued summons and 6 copies with 6 copies of complaint

6/ 9/69 Filed Notice by Defendants of Deposition of Thomas Ricci and Anthony A. Ricci

6/17/69 Filed Stipulation

6/17/69 On stipulation of parties, through their respective attorneys, enter order extending to July 11, 1969 defendants time to answer or otherwise plead to the complaint herein. Parsons, J. Mailed Notices 6/18/69

7/ 9/69 Filed Appearance of Siegel Trading Co. and Joseph Siegel

7/ 9/69 Filed Affidavit rule 39

7/ 9/69 Filed Motion to dismiss by Siegel Trading Co. and Joseph Siegel

7/10/69 Filed Notice and Motion to compel answers to questions propounded to Thomas Ricci and Exhibits.

7/10/69 Filed Motion of Chicago Mercantile Exchange, Everette B. Harris William Phelan and Leo Melamad to dismiss for lack of jurisdiction

7/10/69 Filed summons returned served

7/11/69 Filed Notice of Motion

7/11/69 Enter order defendants The Siegel Trading Co. Inc. and Joseph E. Siegel given extension of time to August 9, 1969, to file brief in support of motion to dismiss. Plaintiff given 30 days after August 9, 1969 to file responsive memorandum. Hoffman, J.
Mailed notices 7/14/69

7/11/69 Filed Notice and Motion to compel answers to questions propounded to Thomas Ricci and Exhibits A and B

7/11/69 Enter order motion of defendants Chicago Mercantile Exchange, William Phelan and Leo Melamed for an order requiring answers to questions propounded to plaintiff Ricci and not answered by him, and for an order that the deposition of Thomas Ricci be reset for the purpose of allowing petitioners to further inquire into the matters as to which said Thomas

Ricci refused to answer, entered and continued to July 16, 1969 at 10:00 a.m. before Judge Parsons. Motion of defendants Siegel Trading Co. Inc. and Joseph E. Siegel for an extension of time to file on or before August 9, 1969 a brief in support of motion to dismiss entered and continued to July 16, 1969 at 10:00 a.m. before Judge Parsons-Hoffman, J. Mailed notices 7/14/69

7/14/69 Filed Notice of Motion re-extension of time to file brief in support of motion to dismiss

7/14/69 Filed Notice of Deposition of Thomas Ricci

7/16/69 Defendants motion for extension of time to file on or before August 9, 1969 a brief in support of motion to dismiss, is allowed. Motion of defendants for an order requiring answers to questions propounded to plaintiff and not answered by him, is allowed. Plaintiff to answer questions as set forth within two weeks of filing of interrogatories setting forth additional questions, also to be answered. Order cause continued to September 29, 1969 for report on status-Parsons, J. Mailed notices 7/17/69

7/17/69 Filed Interrogatories propounded pursuant to order of July 16, 1969

7/17/69 Filed Deposition of Thomas Ricci

7/30/69 Filed Answer of Thomas Ricci to Interrogatories propounded pursuant to order of Court entered July 16, 1969

8/11/69 Filed Memorandum in support of Motion to dismiss by Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamad

8/11/69 Filed Memorandum of Defendants Joseph E. Siegel and The Siegel Trading Co., Inc. in support of Motion to dismiss

8/19/69 Filed Notice of Motion and Motion for order that depositions not be taken and Objection to Notice of Deposition

8/21/69 Order motion of defendants Everette B. Harris and Leo Melamed for an order that the depositions of said defendants not be taken is denied and the Court directs that said depositions be taken-Marovitz, J.
Mailed notices 8/21/69

8/21/69 Filed Stipulation

8/21/69 Enter order on stipulation to continue the depositions of Everette B. Harris and Leo Melamed to September 15, and allow Plaintiff to October 6, 1969 to file memorandum in opposition to motions to dismiss and defendants to reply 10 days thereafter-Marovitz, J. Mailed notices 8/21/69

8/21/69 Filed Notice of Depositions of Everette B. Harris and Leo Melamed

9/29/69 Filed Notice of Motion

9/29/69 Filed Motion for extension of time to file memorandum in opposition to defendants motion to dismiss

9/29/69 Filed Notice of Motion for Production of Documents and Affidavit in support thereof

9/29/69 Plaintiff given 20 days to file answering brief in opposition to defendants motions to dismiss. Order cause continued to October 27, 1969 for ruling on motions to dismiss. Plaintiff's motion for an order on certain defendants to comply with notice of deposition and to produce certain documents, and for assessment of costs and attorneys fees is entered and continued to October 27, 1969-Parsons, J.
Mailed notices 9/30/69

10/20/69 Filed Brief of Plaintiff's answer to Defendants motion to Dismiss

10/24/69 Filed Reply Brief in support of Motion to dismiss of defendants Joseph E. Siegel and The Siegel Trading Co.

11/ 3/69 Filed Plaintiff's objections to Memorandum of Opinion

11/ 3/69	Defendant's motion to present Memorandum Opinion and plaintiff's objections thereto are taken under advisement and ruling on November 12, 1969-Parsons, J. Mailed notices 11/4/69
10/27/69	The Court rules orally from the bench re: motions to dismiss. Counsel to prepare and submit within a short date findings of fact, conclusions of law and order consistent with the Court's ruling-Parsons, J. Mailed notices 11/4/69
11/12/69	Enter order ruling on defendants motion to present Memorandum Opinion and Plaintiff's objections thereto is continued to November 25, 1969-Parsons, J. Mailed notices 11/13/69
11/25/69	Motion of defendants to dismiss the complaint is allowed, and it is so ordered-Parsons, J. Mailed notices 11/12/69
12/17/69	Filed Notice of Appeal by Plaintiff
12/17/69	Mailed copy of Notice of Appeal to Lee A. Freeman and Max and Herman Chill
12/18/69	Filed Bond on Appeal
1/16/70	Filed Deposition of Thomas C. Ricci
1/16/70	Filed Continued Deposition of Thomas Ricci
1/22/70	Clerk's File copy of Transcript of Proceedings had on November 25, 1969 filed by Official Court Report
1/20/70	Filed Deposition of Leo Melamed
1/23/70	Filed Stipulation as to Record on Appeal
6/17/71	Opinion and Order of the Court of Appeals for the Seventh Circuit.
10/ 5/71	Order denying petition for rehearing and petition for rehearing *en banc*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

(Civil Action No. 69-C-1030)

COMPLAINT

JURISDICTION AND VENUE

1. This action is brought under Sections 4 and 16 of the Act of October 15, 1914, as amended, commonly known as the Clayton Act, 15 U.S.C. Sec. 15 and 26, for violations of Sec. 1 of the Act of July 2, 1890, as amended, commonly known as the Sherman Act, 15 U.S.C. Sec. 1. Jurisdiction is conferred on the Court by virtue of 28 U.S.C. Sec. 1337.

2. Defendant, Chicago Mercantile Exchange, is a corporation incorporated under the Laws of the State of Illinois and is doing business in the Northern District of Illinois. The Siegel Trading Company is a corporation and is doing business in the Northern District of Illinois. Each of the individual defendants resides in the Northern District of Illinois. The venue of this Court is thus duly established under 28 U.S.C. Sec. 1391 (b) and (c).

DESCRIPTION OF PARTIES

3. Plaintiff, Thomas Ricci, (hereinafter referred to as "Ricci") is an individual and citizen of the State of Illinois and a member of the Chicago Mercantile Exchange, having his principal place of business at Chicago, Illinois, and engaged in the business of a commodity broker and floor broker trading in commodities and commodity futures on his own account and on behalf of others for a commission, including the purchase and sale of such commodities in interstate commerce.

4. Defendant, Chicago Mercantile Exchange, is a corporation organized and existing under the General Not-For-Profit Corporation Act of the State of Illinois, having approximately 500 members and engaged in operating at Chicago, Illinois, a commodity exchange for trading among

its members in various commodities and commodity futures in interstate commerce.

5. Defendant, Everette B. Harris, is the President of the Chicago Mercantile Exchange. The defendant, William Phelan, is Vice President of the Chicago Mercantile Exchange in charge of audits and investigation and the defendant, Leo Melamed, is Chairman of the Board of Directors of the Chicago Mercantile Exchange.

6. The defendant, Siegel Trading Company, is a corporation and a Clearing House member of the Chicago Mercantile Exchange. The Clearing House of the Chicago Mercantile Exchange is an agency of the Exchange existing to facilitate the speedy adjustments of contracts made by its members. The Clearing House is compromised of a number of members of the Chicago Mercantile Exchange known as clearing members. In order for a corporation to become a member of the Exchange two of its officers or directors must be members of the Chicago Mercantile Exchange.

7. The defendant, Joseph E. Siegel, is the President of the Siegel Trading Company.

8. By virtue of the foregoing, the plaintiff, "Ricci" has until the occurrences hereinafter set forth:

(a) Freely competed in the purchase and sale of various commodities for sale and delivery in interstate commerce;

(b) Freely competed in the purchase and sale of various commodities for future delivery of large quantities of such commodities in interstate commerce;

(c) Freely executed futures contracts on behalf of himself and on behalf of others for a commission large quantities of such commodities in interstate commerce.

9. That during the times herein mentioned the Chicago Mercantile Exchange was designatee of the Secretary of Agriculture as a "contract market" for future trading of

commodities, pursuant to the provisions of the Commodity Exchange Act, as amended, (7 U.S.C. Sec. 1-17 (a)).

10. That during all the times herein mentioned, the Exchange has enacted or caused to be enacted by its Board of Governors the following pertinent rules, by-laws and regulations:

RULE 307: SALE OF MEMBERSHIP. "Membership in the Exchange is a personal privilege subject to sale and transfer only as authorized herein. When a member or the legal representative of a deceased or incompetent member desires to sell a membership, he shall sign an authorization to transfer in such form as shall be prescribed by the Board. An individual who desires to purchase a membership shall notify the President to such effect and when an agreement with a seller shall have been made shall sign a confirmation of purchase and shall deposit with the President a transfer fee in the amount of $100.00 and also a certified check, payable to the Exchange, for the amount of the agreed purchase price."

RULE 311: PRIORITY OF LIENS AGAINST MEMBERSHIP.

"Upon any sale of membership owned by a member, whether by the member or by the Board, the proceeds of sale shall be applied to the following purposes and in the following order of priority:

A. First Priority. All dues, fines, contributions, charges and other indebtedness due to the Exchange from the member whose membership is transferred;

B. Second Priority. If said membership has been pledged to the Exchange as security for the indebtedness of a Clearing Member to the payment of such indebtedness;

C. Third Priority. Sums due to creditors who are members or clearing members of the Exchange or who are registered corporations or partnerships under Rule 321 E on all claims filed against the member whose mem-

bership is transferred to the extent that such sums shall be determined by the Board to have arisen out of Exchange transactions and shall have been allowed by the Board. If the amount of such claim is contingent or cannot be immediately ascertained, the Board may direct an amount be withheld from the proceeds which it may deem sufficient to cover such claim when the amount of the same is ultimately ascertained. In determining the amount of a claim, the Board shall deduct the fair value of any collateral held therefor and the Board may require that all collateral held by a creditor be disposed of before passing on the claim.

No Other Liens Shall Be Recognized. Liens for money advanced for the purchase of a membership, or advancements against the same, or claims growing out of non-Exchange transactions shall not be recognized."

RULE 313. FILING CLAIMS. "In order for a member to establish a lien and to become entitled to his right under Rules 311 and 312, he shall file with the President a statement of his claim prior to the transfer of membership. Claims filed subsequent to the transfer but previous to any payment to the seller, which are allowed by the Board, may be paid by the Board out of any surplus remaining after all other claims described in Rule 311 have been paid in full and such claims shall be paid in the order of filing."

RULE 322. QUALIFICATIONS TO TRADE. "A member may be qualified to trade on the Spot and To-Arrive Calls provided he has been authorized by a firm or corporation which has been qualified pursuant to Rule 810 to engage in trading on said calls. A member may be qualified to trade on the futures call provided he has been authorized by a firm or corporation which is a Clearing Member."

RULE 324. COMMODITY EXCHANGE ACT. "Members of the Exchange are required to comply with all lawful provisions of the Commodity Exchange Act and the

rules and regulations thereunder lawfully promulgated by the Secretary of Agriculture and the rules of the Exchange shall be construed to conform thereto."

COMMODITY EXCHANGE ACT, as amended, 7 U.S.C. 1-17a Sec. 5(f)(9). "The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

"Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture."

COUNT I

11. On or about May 1, 1967, the plaintiff, "Ricci", purchased a membership in the Chicago Mercantile Exchange and became a member thereof as a qualified broker to trade for himself and for others, in accordance with the rules and regulations of the Chicago Mercantile Exchange and The Commodity Exchange Authority.

12. That at all times hereinafter mentioned the plaintiff, "Ricci", was and still is engaged in the business of broker and trader on the Chicago Mercantile Exchange, executing future contracts on behalf of himself and for others on commission of large quantities of commodities in interstate commerce.

13. That in order to become a member of the Chicago Mercantile Exchange, the plaintiff, "Ricci", was required to purchase said membership in the Chicago Mercantile Exchange with his own funds and that the membership committee of the Chicago Mercantile Exchange would not approve the plaintiff's membership unless a statement in writing was made that the membership was purchased with plaintiff's own funds.

14. That from on or about May 1, 1967, to on or about February 11, 1969, the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange continued to trade therein on behalf of himself and others; thereafter the defendant, Chicago Mercantile Exchange, wilfully, unlawfully, knowingly and maliciously confederated, combined and conspired and agreed with Siegel Trading Company, Joseph E. Siegel, together with Everette B. Harris, William Phelan and Leo Melamed, defendants herein, to prevent the plaintiff, "Ricci", from continuing as a member of the Chicago Mercantile Exchange and to trade and transact his business in interstate commerce as hereinabove alleged.

15. That on or about February 11, 1969, when the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange was informed by the defendants, Chicago Mercantile Exchange and Everette B. Harris, President, that the defendant, Siegel Trading Company, claimed to be the owner of his membership in the Chicago Mercantile Exchange, the plaintiff, "Ricci" thereupon notified and informed the Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, defendants herein, that he was the owner and holder of a membership of the Chicago Mercantile Exchange; that the Siegel Trading Company was indebted to him in the sum of approximately $18,175.00 for floor brokerage fees from May 19, 1967, thru February 11, 1969, and that there was an offset of $15,000.00 for which the plaintiff, "Ricci", was indebted to the Siegel Trading Company on their loan to him for his original acquisition of a membership in the Chicago Mercantile Exchange, and that the Siegel Trading Company did not have any lien against his membership, as provided for in the rules of the Chicago Mercantile Exchange hereinabove set forth; that the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, were aware of the plaintiff's membership as herein set forth for the reason the defendant, William Phelan, acknowledge same and directed the plaintiff, "Ricci", to follow a plan as

outlined in the memorandum hereto attached and made a part hereof as Exhibit "A".

16. It was part of said conspiracy that the defendant, Joseph E. Siegel, individually and the Siegel Trading Company, a corporation, did induce the Chicago Mercantile Exchange through its officers, Everette B. Harris, William Phelan and Leo Melamed, to violate the rules and regulations of the Chicago Mercantile Exchange to deprive the plaintiff of his membership in the Chicago Mercantile Exchange and to deny him the privilege of trading in a "contract market" in interstate commerce, as provided for in the Commodity Exchange Act, as amended, the rules and regulations of the Secretary of Agriculture of the United States Government, all in accordance with 7 U.S.C. Sec. 1-17(a).

17. It was a further part of said conspiracy that the defendants, Everette B. Harris, William Phelan, Leo Melamed, Siegel Trading Company and Joseph E. Siegel to attempt to have the plaintiff, "Ricci", deprived of his membership and privilege of trading on the Chicago Mercantile Exchange by attempting to induce the Helfer Commodities, a Clearing House member of the Chicago Mercantile Exchange, to issue an ante-dated release as of June 13, 1968, to the defendant, Siegel Trading Company, in order to terminate and endanger the right of the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange to trade on commodities in interstate commerce for himself and others; that the co-conspirators, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, well knew that the defendants, Everette B. Harris and the Chicago Mercantile Exchange had no authority to seek any attempted release on behalf of the plaintiff, "Ricci", nor did the defendants, Everette B. Harris and the Chicago Mercantile Exchange, have any authority or prerogative to determine to whom such an attempted release could be directed to.

18. In pursuance of said conspiracy and for its purpose to carry out its objects and purposes, that on or about February 11, 1969, the co-conspirators, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, did in fact cause the Chicago Mercantile Exchange to transfer the membership of the plaintiff, "Ricci", without a hearing or notice to one James F. Reich at a reported sales price of $45,000.00; that the plaintiff, "Ricci", was deprived of his right to act as a member of the Chicago Mercantile Exchange as a floor broker and trader for himself and for others from on or about February 11, 1969, until March 4, 1969; that as a further part of said conspiracy by the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, to discontinue and remove the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange and to deprive him of his right to trade on behalf of himself and others in commodities in interstate commerce. The plaintiff, "Ricci", in order to maintain his customers and to expand and increase his business was obliged and forced to purchase a membership in the Chicago Mercantile Exchange as of March 4, 1969, for which he paid a price of $45,000.00 therefor.

19. In furtherance of said conspiracy between the Chicago Mercantile Exchange and Everette B. Harris, the defendants, Joseph E. Siegel and the Siegel Trading Company, induced the defendant, Chicago Mercantile Exchange, to accept a blank authorization to transfer membership that had previously been revoked by the plaintiff, "Ricci", with full knowledge that said membership belonged exclusively to the plaintiff, "Ricci", for the reason that the defendant, Siegel Trading Company, was indebted to the plaintiff for floor brokerage fees from May 19, 1967 thru February of 1969 in the sum of approximately $18,175.00 against which the plaintiff, "Ricci", was indebted to the Siegel Trading Company for the sum of $15,000.00 which was the purchase price of plaintiff's membership in the Chicago Mercantile Exchange; that

the conspiracy between, the Chicago Mercantile Exchange, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, has been done with full knowledge of the violation by the Chicago Mercantile Exchange of fraudulent financial statements of the defendant, Siegel Trading Company, in that the financial statements of the defendant, Siegel Trading Company, do not reveal or reflect liabilities in excess of $200,000.00 that were partially due to the plaintiff, "Ricci", and others as floor brokers that had filled orders on the Chicago Mercantile Exchange for Siegel Trading Company, all in violation of the rules and regulations of the Chicago Mercantile Exchange and the Commodity Exchange Act, as aforesaid; that the defendant, Chicago Mercantile Exchange, being a "contract market" within the meaning of the Commodity Exchange Act must abide by the rules of the Commodity Exchange Act as well as the enforcement of its own rules relating as to membership, financial structure and policing of its members as set forth in all the rules and regulations of the Commodity Exchange Act and the Chicago Mercantile Exchange.

20. All of the aforesaid acts of the defendants, as co-conspirators, was done maliciously, wilfully, knowingly, unlawfully and without just cause or provocation, with the unlawful and illegal intent, purpose and object of restraining and preventing plaintiff from exercising an essential and necessary part of his lawful trade or business in interstate commerce; preventing the plaintiff from rendering to himself and for his customers in interstate trade or commerce, the services necessary and essential for the continuation of plaintiff's business and for the purpose of unlawfully and illegally eliminating said business of plaintiff's in interstate commerce.

21. All of the aforesaid acts of the defendants were in violation of the provisions of Title 15, U.S.C.A., Sec. 1, etc. and in particular Acts of Congress of July 2, 1890, and October 15, 1914, commonly known as the Sherman Anti-Trust Act, and the Clayton Act, and the

subsequent acts of Congress amendatory and supplemental thereto.

22. As a result of the wrongful acts of the defendants and the co-conspirators, the plaintiff has sustained great loss and damage which has been inflicted upon him by virtue of said conspiracy and the acts of said defendants as co-conspirators done in pursuance thereof; that said defendants and said co-conspirators intended that the plaintiff should be damaged and put to expense and loss of customers, trade and profits as a result of their acts.

23. As a further result of said unlawful acts of the defendants as aforesaid, the plaintiff has been placed in a substantial competitive disadvantage of his business as a trader and broker in dealing in products in interstate commerce by having direct access to the commodity market of the Exchange.

24. That plaintiff's business as a broker had been destroyed as his customers have been diverted by others and he has lost and continues to lose vast amounts of broker's commission; that the beneficial commercial relations between the plaintiff and his customers and other members of the Exchange have been destroyed.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants as aforesaid as unlawful and in violation of the Sherman Act, and that the plaintiff has been injured thereby in his property within the meaning of Sec. 4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of Sec. 1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known

as the Sherman Anti-Trust Act and the Clayton Act three-fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT II

25. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this Complaint.

Wherefore, plaintiff asks as follows:

1. That this Court declare that the actions of the defendants, as aforesaid, are intentional, unlawful and tortious interference with advantageous commercial relationships existing between the plaintiff, his customers and other members of the Chicago Mercantile Exchange under the common law of the State of Illinois;

2. That plaintiff recover the amount of damages sustained as the result of defendants unlawful acts, as aforesaid, together with punitive damages in an amount not less than $500,000.00 and the costs of this suit.

3. For such other or further relief as the Court may deem equitable or proper.

COUNT III

Plaintiff complains of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan, and Leo Melamed, and states as follows:

26. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this complaint.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, as unlawful and in violation of the Sherman Act, and that the plaintiff has

been injured thereby in his property within the meaning of Sec. 4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of Sec. 1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act three-fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT IV

Plaintiff complains of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, and states as follows:

27. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this complaint.

Wherefore, plaintiff asks as follows:

1. That this Court declare that the actions of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, are intentional, unlawful and tortious interference with advantageous commercial relationships existing between the plaintiff, his customers and other members of the Chicago Mercantile Exchange under the common law of the State of Illinois.

2. That plaintiff recover the amount of damages sustained as the result of defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, unlawful acts, as aforesaid, together with puni-

tive damages in an amount not less than $500,000.00 and the costs of this suit.

3. For such other or further relief as the Court may deem equitable or proper.

Plaintiff complains of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, and states as follows:

28. Plaintiffs adopts and realleges paragraphs one thru twenty-four of Count I of this Complaint.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, as unlawful and in violation of the Sherman Act, and that the plaintiff has been injured thereby in his property within the meaning of Sec. 4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of Sec. 1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act three fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT V

Plaintiff complains of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, and states as follows:

28. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this Complaint.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, as unlawful and in violation of the Sherman Act, and that the plaintiff has been injured thereby in his property within the meaning of §4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of §1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act three fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT VI

Plaintiff complains of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, and states as follows:

29. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this complaint.

Wherefore, plaintiff asks as follows:

1. That this Court declare that the actions of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, are intentional, unlawful and tortious interference with advantageous commercial relationships existing between the plaintiff, his customers

and other members of the Chicago Mercantile Exchange under the common law of the State of Illinois.

2. That plaintiff recover the amount of damages sustained as the result of defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, unlawful acts, as aforesaid, together with punitive damages in an amount not less than $500,000.00 and the costs of this suit.

3. For such other or further relief as the Court may deem equitable or proper.

/s/ Harry H. Fortes
/s/ Fred J. Ginsburg
Harry H. Fortes and
Fred J. Ginsburg
Attorneys for Plaintiff
11 South LaSalle Street
Chicago, Illinois 60603
FRanklin 2-5133

EXHIBIT A

1. Submit bill by month

2. Offset $15,000 for membership + 6% interest from date of purchase to date of bill

3. Set forth amount due & owing T.R.

4. Demand return of document dated 10-24-67

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 69-C-1030) • •

MOTION TO DISMISS
(Filed July 9, 1969)

Now comes defendants, The Siegel Trading Co., Inc., and Joseph E. Siegel by Max & Herman Chill, their attorneys, and move the Court to dismiss Count I, Count II, Count V, and Count VI of the complaint herein for failure to state a claim upon which relief can be granted, and for lack of jurisdiction, on the following grounds:

1. This action does not lie under Sec. 1 of the Sherman Act, 15 U.S.C. Sec. 1 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26, for the reason that the complaint does not state facts which constitute a conspiracy in restraint of trade, but merely puts in issue, the question of who was the true owner of the Chicago Mercantile Exchange membership in question.

2. Plaintiff and these defendants are all citizens and residents of the State of Illinois and hence there is no diversity of citizenship in this cause.

Wherefore, defendants, The Siegel Trading Co., Inc. and Joseph E. Siegel pray that this suit be dismissed with costs most wrongfully sustained.

Max and Herman Chill
By /s/ Charles B. Bernstein
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 69-C-1030) • •

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER
(Filed July 10, 1969)

Defendants Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed move the Court to dismiss this action on the ground that the Court lacks jurisdiction because it appears on the face of the complaint that the alleged claim does not arise under Section 1 of the Act of July 2, 1890, commonly known as the Sherman Act, 15 U.S.C. Sec. 1, as amended, and that no recovery may be had under Sections 4 and 16 of the Act of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C. Sec. 15 and 26, as amended.

/s/ Lee A. Freeman
Lee A. Freeman, Attorney for
Chicago Mercantile Exchange,
Everette B. Harris,
William Phelan and
Leo Melamed

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons

Cause No. 69C1030 Nov. 25, 1969

Thomas Ricci v. Chicago Mercantile Exch. etal

Ruling on deft's motion to present Memo., Opinion and plaintiff's objcs. thereto.

Motion of defendants to dismiss the complaint, is allowed, and it is so ordered.

/s/ Parsons, J

EXCERPTS FROM DEPOSITION

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 69 C 1030) * *

The deposition of Thomas Ricci, called by the defendants for examination pursuant to notice and pursuant to the Rules of Civil Procedure for the United States District Court pertaining to the taking of depositions for the purpose of discovery, taken before JULIUS R. CARTER, C.S.R., a notary public within and for the County of Cook and State of Illinois, at Suite 3700, One North LaSalle Street, Chicago, Illinois, on the 19th day of June, A. D. 1969.

Appearances:

Messrs. Harry H. Fortes and
Fred J. Ginsburg,
for the plaintiff;
Mr. Lee A. Freeman,
for the defendants.

12 * * * (By Mr. Freeman:)

Q. Now, I put the question to you, Mr. Ricci, and I ask you for an answer:

Did you at the time you made application for membership in this Exchange represent to the Exchange
13 that it was your funds that were paying for the membership?

A. This is the way it was: When I filled out the application for membership, I put down on the application that I received a loan from the Siegel Trading Company.

Q. Is that what you said you put down?

A. Yes, this is what I put down. When I was before the membership committee they asked me if these were my funds, and I told them no, they were not.

They said, "Is it your money?" And I said, "No, I received a loan from the Siegel Trading Company."

They told me, they said, "You have to change your answer that these are your funds. We don't care where you got the money, whether you got it from Siegel Trading Company, whether you got it from your father, or where

you got it from. I want you to put 'yes,' that these are your own funds."

They drew a line through the "no," and through the part where it said, "These funds—" that I received a loan from the Siegel Trading Company. The answer was answered "Yes." That these are my own funds. And this is the way it was.

Q. How was the loan evidenced that you said you received?

A. It was right there on the application.

Q. What was the loan?

A. The loan was for the amount of membership.

Q. How much was it?

A. $15,000.00.

Q. Was that what memberships were selling for, then?

A. Yes, sir, it was.

* * *

* * *

(By Mr. Freeman:)

Q. Did you at the same time that you made application also sign a slip authorizing transfer of membership and give it to Joe Siegel?

A. No, sir.

Q. When did you sign such authorization?

A. I don't know the day. It was in October of something, '67, six months after I became a member, I believe.

Q. What were the circumstances of your signing that?

A. Mr. Winograd, who is the secretary-treasurer of Siegel Trading Trading Company, came to me and asked me to sign it, because they didn't have—he said—

Q. What did he say? Tell the truth. You are about to—

Mr. Ginsburg: I object to your remarks.

* * *

* * *

* * * The Witness: I don't remember his exact words.

(By Mr. Freeman:)

Q. What is the substance of what Mr. Winograd—

A. Well, they didn't have any—that I didn't sign any note or anything before, and I don't recall.

Q. Why don't you recall? Well, you were saying—

A. I am very nervous at the moment, that is one reason.

Q. I am sorry. Do you want a cup of coffee?

A. Yes, I think I would like a cup of coffee.

Q. Let's take a recess, and we will get a cup of coffee. I don't want to make you nervous.

(Short recess.)

Q. During the recess, was your memory refreshed with respect to what conversation, substance of the conversation you had with Mr. Winograd?

A. Yes.

Q. Tell us about it.

A. He said that— he asked me to sign it; I read it. The reason he asked me to sign it was that he said that the Siegel Trading Company didn't have any protection for the money that they loaned me for my membership at the Mercantile Exchange. And I knew that I owed Siegel $15,000.00 for the membership at the time, and I signed it.

* * *

* * *

Q. Do you know what the rules of the Exchange are with respect to whether or not a broker can be qualified by more than one clearing house?

A. He can—to my knowledge, he can only be qualified by one clearing house.

Q. And that he has to have a release from the clearing house that qualifies him before he can be qualified by another house?

A. Yes, sir.

Q. Then, when Siegel Trading Company was suspended, did you get a release from Siegel Trading Company so that you could be qualified by Helfer?

A. Yes, sir, I was, and it was signed by Alvin Winograd.

Q. Yes, of course, no question about it.

Did you ever get a release from Helfer after Siegel became reinstated as a clearing member?

A. No, sir.

Q. Did you act as a broker for Siegel, the clearing member, subsequent to the time of reinstatement?

A. You mean did I fill orders for Siegel Trading Company?

Q. Yes.

A. Yes, I filled orders for Siegel, I filled orders for—

* * *

36-60 * * *

61 * * * (By Mr. Freeman:)

Q. Did you receive a transfer of membership, of your father's membership on or about March 4, 1969?

A. Yes, I did.

Q. And was that transfer of membership made simultaneously with the transfer of membership from you through Siegel Trading Company to James F. Reich on the same day?

A. From me?

Q. Yes. Execution of that authorization to transfer

62 what you said was evidence of an indebtedness. Let me put it this way:

On March 4, did you receive a transfer of membership from your father approved by the Exchange, and did you at that time lose the membership that you had from Siegel Trading?

A. Yes.

* * *

63-69 * * *

70 * * * Mr. Freeman: Now, Mr. Ricci, I understand you.

Now, with respect to your commissions, whatever the situation is, isn't that a controversy between you and Joseph Siegel, and only between you and Joseph Siegel?

A. The commissions?

Q. Yes.

A. I would say no because Mr. Siegel said that he did not owe me any money.

Q. And you said he owed you money?
A. Yes.
Q. Then, isn't that a dispute between you and Joseph Siegel?
71 A. Oh, it is a dispute between he and I, yes, it is.
Q. Did you ever bring that to the Board for the purpose of securing arbitration?
A. Of course.
Q. When?
A. The same day that I went there for my membership. And if you will talk to the Board of Governors, they will tell you that the way I was supposed to go to arbitration was a twofold agreement.
Q. That is what you said before. Why did you withdraw from the arbitration?
A. Like I said, it was a twofold agreement. I understand that Mr. Siegel came up and finally said that he owed me the $18,000.00. Therefore, we didn't have to go to arbitration.

* * *

72-79 * * *
80 * * * Q. Tell me this: Was there any interruption in your privilege of membership? Was there a single day when you were not a member of the Exchange during the period from January, 1969 to April, 1969?
A. No.
Q. So at all times you were a member of the Exchange, and you have been a member of the Exchange since May, 1967, whichever date it is?
A. Yes.

* * *

EXHIBITS TO DEFENDANTS' DEPOSITION OF THOMAS RICCI

EXHIBIT No. 7
February 24, 1969

Mr. Thomas C. Ricci
THE SIEGEL TRADING COMPANY
100 North LaSalle Street
Chicago, Illinois 60602
Dear Mr. Ricci:

IN RE: Membership of Thomas C. Ricci
You are hereby requested to submit the dispute between The Siegel Trading Company and Thomas C. Ricci over the ownership of the above membership to the Arbitration Committee. Enclosed is a copy of the Chicago Mercantile Exchange "Arbitration Agreement" which you should execute and return to me as soon as possible. Please submit the arbitration fee as set forth in Chicago Mercantile Exchange Rule 512 when you return the Arbitration Agreement.

The Arbitration Committee has scheduled the matter for Wednesday, March 5, 1969, at 2:15 P. M. in the Committee Room in the Exchange Building. You may be represented by counsel.

Sincerely yours,
Everette B. Harris
President

EBH:jh
Enc.

EXHIBIT No. 6

CHICAGO MERCANTILE EXCHANGE

ARBITRATION AGREEMENT

In re: The Siegel Trading Co. v. Thomas C. Ricci
It is hereby mutually agreed between the parties whose signatures are hereto attached that they will abide by the

rules of the Chicago Mercantile Exchange in the matter which they are preparing to submit to the Chicago Mercantile Exchange for arbitration.

/s/ J. C. Siegel

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EXHIBIT No. 8

February 25, 1969

Mr. Thomas C. Ricci
THE SIEGEL TRADING COMPANY
100 North LaSalle Street
Chicago, Illinois 60602

Dear Mr. Ricci:

Mr. William M. Phelan from the Department of Audits and Investigations has reported to me that your counsel, Mr. Harry Fortes, has indicated an unwillingness to submit to arbitration the dispute between yourself and The Siegel Trading Company with respect to your membership. I wrote to you on February 24, 1969, under the assumption that both parties had agreed to arbitration and, accordingly, we had scheduled a hearing.

In view of the attitude of Mr. Fortes in rejecting arbitration as a means of settling such dispute, my letter of February 24, 1969, should be disregarded.

Further, if we do not hear from you to the contrary by Friday, February 28, 1969, consider the arbitration cancelled and the Exchange will proceed in accordance with its rules.

Sincerely yours,
Everette B. Harris
President

EBH:jh

EXHIBIT No. 2

HARRY H. FORTES
Attorney at law

11 South LaSalle St.
Chicago, Illinois 60603
FR 2-5133

February 27, 1969

Michael Weinberg Jr., Secretary,
The Chicago Mercantile Exchange,
110 N. Franklin Street,
Chicago, Illinois.

In Re: Thomas Ricci

Dear Mr. Weinberg:

In accordance with rule 500 Mr. Thomas Ricci has been directed by Everette B. Harris to submit the matter of the ownership of his membership to arbitration. It is my interpretation that this matter is not within the scope defined as being arbitrative. To coerce Mr. Ricci to submit is a direct denegation of several of our rules.

There are also several other germane matters incidental to this situation. On behalf of Mr. Ricci I would appreciate the opportunity of presenting an appeal to the Board of Governors, as made and provided for in rule 500.

Sincerely yours,
/s/ Harry H. Fortes
Harry H. Fortes

HHF:ds

EXHIBIT No. 3

Telephone RAndolph 6-6490
CHICAGO MERCANTILE EXCHANGE
110 No. Franklin Street
Chicago 60606
Executive Offices

February 28, 1969

Mr. Harry Fortes
Attorney at Law
11 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Fortes:

Mr. Michael Weinberg submitted to me a copy of your letter to him dated February 27, wherein you state that I directed Mr. Thomas Ricci to submit to arbitration and you request appearance before the Board.

In this regard please be advised that the matter of arbitration was agreed to between the parties in question and not at my direction. Additionally, after receipt of your communication that you do not wish your client to submit to arbitration, the Exchange notified your client that the arbitration hearing had been cancelled.

Accordingly, I do not feel it will be necessary for you to appear before the Board in this regard.

Very truly yours,
Everette B. Harris
President

cc: Mr. Thomas Ricci

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

No. 18222
THOMAS RICCI,
Plaintiff-Appellant,
v.
CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 17, 1971

Before HASTINGS, *Senior Circuit Judge,* and KILEY and KERNER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* Plaintiff Ricci brought this action under sections 4 and 16 of the Clayton Act, Title 15, U.S.C.A. §§ 15[1] and 26,[2] seeking injunctive relief

[1] Title 15, U.S.C.A. § 15 provides:
"§ 15. Suits by persons injured; amount of recovery
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

and treble damages. The complaint charged defendants Chicago Mercantile Exchange, its president, Everette B. Harris, its vice-president, William Phelan, its board chairman, Leo Melamed, and Siegel Trading Company and its president, Joseph Siegel with violations of section 1 of the Sherman Act, Title 15, U.S.C.A. § 1[3] and tortious interference with commercial relationships. Siegel Trading Company and Siegel[4] moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for want of jurisdiction. In a separate motion to dismiss, the Exchange defendants argued the complaint failed to state a cause of action under section 1 of the Sherman Act. From an order granting defendants' motions to dismiss, plaintiff appeals.

(Footnote Continued)

cover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] Title 15, U.S.C.A. § 26 provides, *inter alia*:

"§ 26. Injunctive relief for private parties; exception

"Any person • • • shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws • • •."

[3] Title 15, U.S.C.A. § 1 provides, *inter alia*:

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States • • • is declared to be illegal • • •."

[4] Siegel Trading Company will be referred to as "Siegel." Likewise, the Chicago Mercantile Exchange and its officers will be referred to as the "Exchange" or the "Exchange defendants."

Count I of appellant's six-count complaint alleged, in substance, that he purchased a membership in the Chicago Mercantile Exchange and became duly qualified to trade in commodities and commodity futures pursuant to the rules of the Exchange and the Commodities Exchange Authority. On February 11, 1969, Siegel induced the Exchange and its officers to transfer appellant's membership to James F. Reich, without hearing or notice, utilizing a previously revoked blank authorization to transfer membership. Such action was allegedly in violation of the rules and regulations of the Exchange and the Commodity Exchange Act and was done in pursuance of an unlawful conspiracy with the intent and for the purpose of restraining appellant from conducting his lawful business.[8] As a result of such transfer, appellant was excluded from trading on the Exchange from February 11, 1969 until March 4, 1969 when he purchased another membership for $45,000.

Counts III and V of the complaint are directed against the Exchange and the individual defendants and reallege the allegations of Count I with respect to violation of the Sherman Act. Counts II, IV and VI charge tortious interference with advantageous commercial relationships and, since all parties are residents of Illinois, will necessarily fall for want of jurisdiction if the Sherman Act allegations are not sustained.

The Exchange defendants claim that the trial court, in ruling on the motions to dismiss, admitted evidence other than that stated in the complaint and thereby converted them into motions for summary judgment. See, Fed. R.Civ. P. 12(b), 56. If this were true, it would allow

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[8] Plaintiff also alleges that the conspirators attempted to induce a "Clearing Member" of the Exchange to issue an antedated release of its authorization of Ricci to trade to Siegel and that the Exchange knowingly failed to enforce its own rules relating to financial reporting. No specific damage is assigned to these allegations.

this court to examine deposition testimony which appellees contend entirely disposes of the case. The short answer is that the transcript of the hearing on the motion to take depositions demonstrates that the court below was considering only the allegations in the complaint when it ruled on the motions to dismiss.

Since this is an appeal from an order granting Rule 12(b), Fed. R.Civ. P., motions to dismiss, we must accept appellant's foregoing allegations of fact as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Duzynski* v. *Nosal*, 7 Cir., 324 F. 2d 924 (1963).

I

Appellant first contends that, absent any justification to be derived from the Chicago Mercantile Exchange's status as a board of trade and a designated "contract market" under the Commodities Exchange Act, Title 7, U.S.C.A. § 1 *et seq.*, the allegations of the complaint are sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

Relying on *Scanlon* v. *Anheuser Busch, Inc.*, 9 Cir., 388 F. 2d 918 (1968), cert. denied, 391 U.S. 916 (1968) and *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 6 Cir., 318 F. 2d 283 (1963), cert. denied, 375 U.S. 922 (1963), the Siegel defendants argue that the facts allegedly merely amount to the substitution of one competitor for another with no resulting public injury and are, therefore, not within the purview of the antitrust acts.

Scanlon, supra, and *Ace Beer, supra,* are inapplicable to the case at bar. Each concerned the cancellation of individual exclusive beer distributing contracts with the immediate substitution of other distributors. The relevant markets were competitive and the courts held that no unreasonable restraint of trade resulted from the refusals to deal since existing competition was not diminished and the cancellation was not an unusual business procedure. See, *Ace Beer, supra* at 287.

Appellant has alleged his exclusion from the Chicago Mercantile Exchange, a monopolistic market, was in violation of its own rules and regulations. Such exclusion is alleged to be a part of a conspiracy to intentionally injure his business. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 1 Cir., 194 F.2d 484 (1952), cert. denied, 344 U.S. 817 (1952), the court was confronted with the exclusion of a trader from a produce building where the sales of fresh fruits and vegetables occurred. The board that managed the building refused to renew the trader's lease after its expiration. The court in finding violations of sections 1 and 2 of the Sherman Act said:

> "[T]he latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *Id.* at 488.

Accepting, as we must, appellant's allegations as to the reasons and manner in which he was excluded, there is no justification for the actions of the Exchange and the individual defendants. The transfer of his membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act.

The absence of an allegation of public injury is not fatal to the maintenance of an action where a *per se* violation is alleged. *Radiant Burners, Inc.* v. *Peoples Gas,*

Light and Coke Co., 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Switzer Brothers* v. *Locklin*, 7 Cir., 297 F. 2d 39 (1961).

Likewise, where the defendants enjoy the power to deny potential competitors access to the market, the absence of competitive change in the relevant market is not fatal to the cause of action. *Gamco, Inc., supra* at 487.

Finally, this is not a case, as appellees contend, where appellant has used traditional antitrust language to transform an essentially state cause of action into a federal antitrust claim. *Compare, Norville* v. *Globe Oil & Refining Co.*, 7 Cir., 303 F. 2d 281 (1962); *Parmelee Transportation Company* v. *Keeshin*, 7 Cir., 292 F. 2d 794 (1961).

In view of the foregoing, we conclude that, absent any justification from the Exchange's status as a board of trade and a designated "contract market," the complaint is sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

II

Relying primarily on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), appellant asserts that no justification can be derived either from the Commodities Exchange Act or from the Exchange's status as a board of trade for the actions herein alleged. Consequently, he claims a cause of action under section 1 of the Sherman Act has been stated.

In *Silver, supra*, member firms of the New York Stock Exchange were ordered by the Exchange to terminate private telephone and tickertape connections to Silver's over-the-counter brokerage firms. The Court, observing that the concerted cut-off by the Exchange and its members had deprived Silver of an asset important to his ability to compete as a broker-dealer, said that such conduct would have been a *per se* violation of the Sherman Act "absent any

justification derived from the policy of another statute or otherwise." *Id.* at 348-49. However, because of the existence of the mandate of self-regulation present in the Securities Exchange Act, the Court sought to "reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications." *Id.* at 349.

The Court concluded that under the circumstances of the case, it did not have to complete the accommodation between the acts since the Exchange did not reach the threshold of justification under the statute and had plainly exceeded the scope of its authority to engage in self-regulation by not informing Silver of the charges underlying the decision to terminate the connections and by not providing an appropriate opportunity to explain or refute such charges despite prompt and repeated requests therefor. *Id.* at 361, 365.

Appellant here contends that the Exchange was not justified in excluding him from trading because nothing in the statutory scheme allows the Exchange to discipline brokers by excluding them from trading. Even if there were such statutory authorization, here he was afforded neither hearing nor notice and, thus, he claims the Exchange did not reach the threshold of justification. Assuming these contentions to be true, they do not dispose of this case.

The Chicago Mercantile Exchange is a "contract market" designated by the Secretary of Agriculture to conduct future trading in commodities pursuant to the Commodity Exchange Act, as amended, Title 7, U.S.C.A. § 1, *et seq.* As a condition of such designation, it must fulfill certain statutory requirements including the enactment and enforcement of bylaws, rules and regulations

which relate to "trading requirements"[6] and which provide "minimum financial standards and related reporting requirements"[7] for members of such markets.

Failure to enforce these bylaws, rules and regulations may result in suspension or revocation of the contract market designation[8] as well as cease and desist proceedings with attendant misdemeanor penalties for failure to com-

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[6] Title 7, U.S.C.A. § 7a provides, *inter alia*:

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate * * * to other trading requirements, and which have not been disapproved by the Secretary of Agriculture * * *."

[7] Title 7, U.S.C.A. § 7a provides, *inter alia*:

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for * * * members of such contract market * * *."

[8] Title 7, U.S.C.A. § 7b provides:

"§ 7b. Suspension or revocation of designation as 'contract market'

"The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a 'contract market' in accordance with the procedure and subject to the judicial review provided in section 8 of this title."

ply.[9] Anyone who acts singly or in concert with another to bring about a violation of rules and regulations issued pursuant to the Act is liable as a principal for such violations and may be subjected to loss of trading privileges on contract markets, as well as cease and desist proceedings with attendant penalties.[10]

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[9] Title 7, U.S.C.A. § 13a provides, *inter alia*:

"§ 13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

"If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter • • • the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, [and upon failure or refusal to comply] shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. • • •"

[10] Title 7, U.S.C.A. § 13c(a) provides:

"§ 13c. Responsibility as principal; • • •

"(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, • • • or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of this chapter • • • may be held responsible in administrative proceedings under this chapter for such violation as a principal."

The facts alleged by appellant to support his antitrust charge are either violations or induced violations of Exchange rules, promulgated pursuant to the Act, which relate to "trading requirements" and financial reporting requirements.[11] As such, they could have been examined by the Commodity Exchange Commission or the Secretary of Agriculture.[12]

Thus, we are *not* confronted with the problem in *Silver* wherein there was "nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358 Rather, the maintenance of a private treble-damage suit in the instant case presents the "problem of conflict or co-extensiveness of coverage with the agency's regulatory power" not considered in *Silver. Id.* at 358.

Chief Judge Swygert, in his concurring opinion to *Thill Securities Corp.* v. *New York Stock Exchange,* 7 Cir., 433 F.2d 264 (1970), cert. denied, 39 U.S.L.W. 3424 (U.S. Mar. 30, 1971), suggested that the district court, on remand, consider this problem of coextensiveness of coverage by de-

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[11] Membership in a contract market is a prerequisite to lawful trading in commodities futures. Title 7, U.S.C.A. § 6. Therefore, Rule 307, allegedly violated in the transfer of appellant's membership, and Rule 322, allegedly violated in the attempt to cancel appellant's authorization to trade, both relate to "trading requirements." The other alleged violation was the failure to enforce financial reporting rules.

[12] The Commission has jurisdiction over alleged violations by the Exchange and its officers. It is composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General or their respective designees. The Secretary of Agriculture may decide to exclude members of contract markets from trading.

termining whether the Securities Exchange Commission possessed primary jurisdiction to judge the New York Stock Exchange's allegedly anticompetitive antirebate rule. *Id.* at 276. The resolution of this issue depended, in part, on the consideration of the following factors: (1) the SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation; (2) the ability of an aggrieved party to initiate SEC review; (3) the extent that SEC expertise would be useful in resolving the question of whether the antirebate rule was necessary to make the Securities Exchange Act work; and (4) the possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits. *Id.* at 277.

Applying these criteria to the instant case, we think it appropriate for the invocation of the doctrine of primary jurisdiction. There exists no express or implied exemption in the Commodity Exchange Act that would prevent the Secretary of Agriculture of the Commodity Exchange Commission from taking into account antitrust principles in their deliberations pursuant to the Act. Judge Leventhal, concurring in *Cities of Statesville* v. *AEC*, D.C. Cir., ... F. 2d ....., (Slip opinion No. 21,706, Dec. 5, 1969) (*en banc*), observed:

> "It is a fair synthesis of the cases [of the Supreme Court and of the D.C. Circuit over the last 25 years] that a statute providing for licensing or other regulation is presumed to permit consideration of antitrust principles, with the harmonizing approach [applied to conflicts between antitrust policies and the agency's other regulatory objectives] • • • unless a contrary intent appears expressly or by necessary implication." (Quotation appears in *Hale* v. *F.C.C.*, D.C. Cir., 425 F. 2d 556, 561 (1970) (concurring opinion)).

Appellant could have applied for the institution of proceedings against the defendants before the Commission and/or the Secretary of Agriculture on the facts alleged

in this case.[13] He could have thereafter petitioned for intervention in any proceedings initiated pursuant to his application.[14] If indeed the allegedly anticompetitive transfer of membership were in violation of Exchange rules, the Commission could have prevented it.

Moreover, the questions here involved are precisely the ones that the Commission and the Secretary are to resolve in fulfilling their watchdog function over the Exchange and its members.[15] The allowance of a private treble

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[13] Title 17, C.F.R. §§ 0.3 and 0.53 provide that "any interested person having any information of any violation of the act" may file an application requesting the institution of proceedings before the Secretary or the Commission, respectively.

[14] Title 17, C.F.R. §§ 0.8, 0.58.

[15] In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the Court dismissed an antitrust action against defendant carriers who had allegedly agreed not to parallel each other's routes. The Civil Aeronautics Board was vested with broad jurisdiction over the air carrier. The Court reasoned at 305:

> "Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."

Although the overall regulatory scheme in the instant case is less pervasive than the scheme in *Pan American*, the specific allegations relate directly to the Commission's and the Secretary's power to designate contract markets and allow the trading in futures by individuals. Such power is no less basic to the regulatory scheme than it was in *Pan American*. Also, *compare Far East Conference*

damage antitrust suit in this case prior to the attempted institution of actions before the Commission or the Secretary would discourage "interested persons" from helping the agency fulfill its regulatory function of insuring that contract markets enforce their own rules and bylaws.

Additionally, there is a potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action. The 1968 amendments to the Commodity Exchange Act provide the Commission and the Secretary of Agriculture with the discretion to refuse to report "minor violations" of the Act for prosecution "whenever it appears that the public interest does not require such action."[16] The award of damages that are essentially punitive in nature[17] could conflict with a decision by the Commission in the "public

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[15] (Continued)
v. *United States*, 342 U.S. 570 (1952); *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) *with California* v. *F.P.C.*, 369 U.S. 482 (1962); *United States* v. *Borden Co.*, 308 U.S. 188 (1939), for ample illustration of Chief Judge Swygert's observation in *Thill, supra* at 277, that cases on primary jurisdiction provide no clear resolution to the issue.

[16] Title 7, U.S.C.A. § 13c(b) provides:
"§ 13c. • • • minor violations
(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action."

[17] As was said in *Commissioner of Internal Revenue* v. *Obear-Nester Glass Co.*, 7 Cir., 217 F.2d 56, 61 (1954), "We might further say that the principal purpose of treble damages seems to be punishment which will deter the violator and others from future illegal acts."

interest" that the punitive steps allowable under the Act should not be taken.[18]

We hold, therefore, that before a private treble damage action for antitrust violations may be brought against these defendants charging violation of the rules promulgated as a condition to a contract market designation, the Commodity Exchange Commission and/or the Secretary of Agriculture must have the first opportunity to secure the fulfillment of the statutory duties imposed upon exchanges and their members. The correct remedy in such a case where there is the possibility of a judicial remedy that cannot be granted by the administrative agency is to remand the case to the district court with directions to stay the proceedings until the agency has acted.[19]

Accordingly, we reverse and remand this action to the district court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

REVERSED AND REMANDED WITH DIRECTIONS

KERNER, *Circuit Judge,* concurring in part and dissenting in part. While I agree that the complaint states a cause of action under the antitrust laws, I do not believe that a remand of this case to the Commission is proper.

Appellant alleges, *inter alia,* that the defendant, Chicago Mercantile Exchange, knowingly conspired with defen-

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[18] We express no opinion on any antitrust immunity that might result from action or inaction taken by the Commission or the Secretary of Agriculture in this case. The complicated issues of reconciliation of the Commodities Exchange Act and the Sherman Act that would be presented will require the benefit of brief and argument before any determination could be attempted.

[19] *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222-223 (1966); *Pan American World Airways, Inc.* v. *United States, supra* at 313, n. 19.

dant, Siegel Trading Company, to prevent him from continuing as a member of the Exchange and, therefore, from transacting his business. Other allegations in the complaint disclose that incidental to proof of appellant's antitrust claim is the proving of a transference of his membership by the Exchange to James E. Reich. Since this transference allegedly would violate Exchange rules, and thereby the Commodity Exchange Act, if not pursuant to a valid authorization, the majority reasons that Ricci must first proceed before either the Secretary of Agriculture or the Commission.

It may be that Ricci could have proceeded before the Commission. However, it does not follow that Ricci *must* proceed before the Commission. The doctrine of primary jurisdiction does not require courts to stay their hand in all controversies which involve factual disputes arguably within the jurisdiction of an administrative agency. Rather the doctrine holds "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). The underlying factual questions in the case at bar involve neither unconventional facts nor administrative discretion.[1] Whether Ricci executed a valid authorization binding on him at the time of transfer is a question which a district court is as competent to assess as a commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. And, since Congress has made the enforcement of contract market rules mandatory (7 U.S.C. §7a(9)), no question of administrative discretion could arise.

Thill Securities Corp. v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert. denied* 39 U.S. L.W. 3424,

[1] The Commission does have discretion to refrain from reporting minor violations of its cease and desist orders for prosecution. See discussion *infra*.

heavily relied upon in the majority opinion, presents a much stronger case for the invocation of primary jurisdiction; yet, two of the judges do not mention the doctrine and the third merely suggests the applicability of the doctrine to the district court.

In *Thill,* a licensed securities dealer brought a class action against the New York Stock Exchange charging an unreasonable restraint of trade and an unlawful monopoly of the securities market in violation of the Sherman Antitrust Act[2] and the Clayton Act.[3] The suit was founded on the Exchange's "anti-rebate rule" which prohibits a member from sharing a commission with a non-member even though the non-member originally received the customer's order. The Exchange contended that the "anti-rebate rule" was within the scope of its authorized self-regulatory powers and that the Securities and Exchange Commission was exercising its statutory power of review which explicitly includes the fixing of reasonable rates of commission.[4] Surely, primary jurisdiction was a more appropriate disposition in *Thill* than it is here. *Thill* was (1) a direct antitrust attack on an exchange rule (2) which involved unconventional facts and (3) statutorily declared administrative discretion.

In addition, Judge Pell noted in his separate opinion "that the very matter in issue is now under consideration by the S.E.C. which on May 28, 1968, announced investigation and public hearings on rate structure matter including economic access to the Exchange market by non-member broker-dealers." (*Supra,* at 278.) Despite this aspect, Judge Pell would have remanded to the district court those antitrust questions which related to the alleged Exchange practice of favoring certain non-members. (*Supra,* at 278.) While Judge Pell dissented from that part of the majority opinion in *Thill* which remanded plaintiff's direct challenge of the "anti-rebate rule" to the district court, he did not

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[2] Sherman Antitrust Act §§1-2, 15 U.S.C. §§1-2 (1964).
[3] Clayton Act §4, 15 U.S.C. §15 (1964).
[4] 15 U.S.C. §78(s)(b)(9).

do so on the basis of primary jurisdiction. Rather, he felt that "the 'fixing of reasonable rates of commission . . . and other charges' as provided for by §19(b) (9) of the Securities Exchange Act of 1934 (15 U.S.C. §78(s) (b) (9)) necessarily includes as an ancillary power the prohibition of rebates." (*Supra*, at 277.) This is a decision on the merits of the anti-rebate rule" and, therefore, not relevant to the question of where litigants must seek their remedy. Hence, neither Judge Campbell nor Judge Pell, a majority of the panel in *Thill*, reached a result consistent with the result reached by the majority today.[5] In fact, the opinions of Judges Pell and Campbell appear to be clear authority against the majority's disposition of the case at bar.

The criteria enumerated by Chief Judge Swygert in his concurring opinion would dictate a remand to the district court in this case.

(1) The SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation.

I assume the majority opinion intends the Commission (Secretaries of Agriculture and Commerce and the Attorney General) to fully decide the issues in this case. Perhaps the very incongruence of these officials deciding difficult antitrust questions is enough to suggest that Congress did not legislate such a result.[6] However, the resolution

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[5] Evidently, Judge Pell believed the New York Stock Exchange is exempt from suits which are direct challenges to its rules. Since Judge Pell concurred in that part of Judge Campbell's opinion which remanded the remaining issues to the district court, he must have concluded that primary jurisdiction was inappropriate.

[6] I merely observe that antitrust law is not within the peculiar province of the Secretaries of Agriculture and Commerce. Of course, quite the opposite is true of the Attorney General who is the chief enforcement officer of the antitrust laws and who could possibly be placed in an inconsistent position in having to judge those suits.

of this question need not rest on such grounds. Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations "of the provisions of this chapter." (See e.g., Title 7, U.S.C. §13a.) This chapter means the "Commodity Exchange Act" (Title 7, U.S.C. §1) and not the "Sherman Act," which is found at 15 U.S.C. §1.

Furthermore, there is no provision in the Commodity Exchange Act which suggests that the Commission should regulate these types of competitive factors in contract markets. This is in contrast with SEC statutory authority to review "reasonable rates of commission" which arguably includes such factors. Yet Judge Swygert did not believe that this statutory granted power of review in the SEC meant, *ipso facto*, that the SEC had the power to consider these factors.[7] Instead, Judge Swygert suggested that the district court consider the question. This careful approach by Judge Swygert is not adopted by the majority although Commission authority to consider antitrust law is, at the least, arguable.

(2) The ability of an aggrieved party to initiate SEC review.

It is reasonably clear that appellant could have applied for the institution of proceedings before the Commission and/or the Secretary of Agriculture and thereafter petitioned for intervention. By regulation, intervention is permitted[8] upon a showing of (a) the petitioner's relation-

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[7] "Cases concerning primary jurisdiction of other administrative agencies to consider antitrust matters do not provide clear guidance for resolution of this question. Compare, *Pan American World Airlines, Inc.* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963); *California* v. *F.P.C.*, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962)." (Concurring opinion of Chief Judge Swygert at p. 277.)

[8] Title 17, C.F.R. §0.8, 0.58.

ship to the matters involved in the proceeding; (b) the nature of the material he intends to present in evidence; (c) the nature of the argument he intends to make; and (d) any other reason he should be allowed to intervene.

These factors indicate that both the Commission and the Secretary of Agriculture possess the power to exclude claimants based on the nature of their claims. Since institution of proceedings is permitted only when there is reason to believe there has been a violation,[9] Ricci might be prevented from asserting his antitrust action before the Commission. Ricci would then return to the district court on his antitrust claim, needlessly multiplying the number of tribunals involved in these proceedings. Of course, this question could be answered, as it was in *Thill*, by a remand to the district court for the taking of evidence.

(3) The extent that SEC expertise would be useful in resolving the question of whether the anti-rebate rule was necessary to make the Securities Exchange Act work.[10]

Seemingly, the relevance of this factor is extremely limited in this case. Ricci has alleged and must prove facts which show an unlawful conspiracy between the Exchange and Siegel Trading Company. A good faith but erroneous decision by the Exchange would not be a violation of the Sherman Act. The power to decide membership requirements implies the power to make good faith but erroneous decisions. Such power is needed to make the Exchange Act work. *Silver* v. *N.Y.S.E.*, 373 U.S. 341, 357. Since Ricci did not allege that a good faith decision by the Ex-

[9] Title 17, C.F.R. §0.3, 0.53. Thus, Ricci may be limited to proof of a Rules violation.

[10] This assumes that the Secretary and/or the Commission have the power to consider antitrust claims. Since the question of primary jurisdiction was neither briefed nor argued orally, we are somewhat inhibited in our analysis.

change to transfer his membership was a violation of the antitrust laws, the question under (3) is whether it is necessary to make the Act work for the Exchange to possess power to determine its membership if these determinations are motivated by otherwise unlawful intent. This is traditional "rule of reason" inquiry which the Court in *Silver* described as "flexible enough to permit the Exchange sufficient breathing space. . . ." (*Supra* at 360.) Whether the Exchange should be insulated from this type of antitrust liability will be considered in the following section. All that remains to be mentioned here is that a district court would have greater expertise and experience in this regard than the Commission. Judge Campbell so held in *Thill*:

> It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. (433 F. 2d at 273.)

Whatever the validity of this holding with regard to the "anti-rebate rule," it is doubtless true here where the technical complexities do not approach those present in *Thill*.

(4) The possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits.

I would think that the aims of the Sherman Act could only be achieved by enforcing that Act against Exchanges which make unlawful transfers of membership for anti-competitive reasons. Perhaps the nature of the action in *Thill* presents a more difficult question; however, I am able to think of no legitimate public policy goals which are advanced by insulating this Exchange from antitrust liability given the conduct alleged in the complaint. The majority opinion indicates none. Yet, the opinion intimates that because of a "potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action" (*infra* at p. 11), the aims of the Sherman Act should be subordinated to the aims of the Commodity Exchange Act. This "potential

repugnance" stems from Commission discretion to refuse to report minor violations of its cease and desist orders.[11] Apparently the majority would permit the Commission, which does not have jurisdiction to consider the question of damages, to foreclose private suits if such foreclosure were deemed in the public interest.

This reconciliation of the Commodities Exchange Act and the Sherman Act is not consistent with prior Supreme Court decisions on the subject. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963); *United States* v. *Borden*, 308 U.S. 188, 198-200 (1939). Significantly, there is no statutory standard or detailed economic regulation to guide the Commission in making its "public interest" determination. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n*, 369 U.S. 482, 484-85, 487-88 (1962). In fact, there is no suggestion that the Commission has ever considered, or desires to consider, the economic impact of its decisions. This is not true either of the FPC or the Comptroller of the Currency. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n, supra.* Yet, these bodies do not possess the kind of power the majority would confer on the Commodity Exchange Commission.

Moreover, there is no "potential repugnance" between the Commodity Exchange Act and the Sherman Act. All Congress has done by granting the Commission the aforementioned discretion is to allow the Commission the traditional freedom available to any public prosecutor. It is a cardinal principal of legislative interpretation to construe away from inconsistencies. Here such a construction is not only unstrained, but also the natural meaning to be given the words used. Faced with this situation, a court should not create inconsistencies and then purport to reconcile them.

For the foregoing reasons, I believe the proper disposition of this case is a remand to the district for further proceedings.

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[11] 7 U.S.C. §13(b).

ORDER

For the Seventh Circuit
Chicago, Illinois 60604

TUESDAY, OCTOBER 5, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

THOMAS RICCI,
Plaintiff-Appellant,
No. 18222
v.
CHICAGO MERCANTILE EXCHANGE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, and the answers of opposing counsel in response thereto, a vote of the active members of the court was requested, and all members of the panel having voted to deny a petition for rehearing, and a majority of the active members having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judge Stevens voted to grant the petition for rehearing *en banc.*